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No. 05-425 SEP 19 2005

IN THE

Supreme Court of the United States

JOHN GOUDIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-21071-CIV-LENARD/BANDSTRA
(97-582-CR-LENARD)

JOHN N. GOUDIE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE came before the Court on John N. Goudie's Motion under 28 U.S. C. §2255 to Vacate, Set Aside, or Correct Sentence (D.E. 1) filed on April 29, 2003. On May 21, 2003, this motion was re-assigned to United States Magistrate Judge Ted E. Bandstra by the Clerk of Court for appropriate resolution in accordance with 28 U.S.C. §636(b). Accordingly, the undersigned conducted an evidentiary hearing on this matter on July 21, 2003. Having carefully considered the motion, the government's response, argument of counsel, the underlying court file and applicable law, the undersigned respectfully recommends that Petitioner's Motion to Vacate be GRANTED for the reasons explained below.

FACTUAL AND PROCEDURAL HISTORY

On July 28, 1997, a federal grand jury sitting in the Southern District of Florida returned an indictment charging John Goudie (hereinafter "petitioner") and others with various federal offenses committed during two related conspiracies. First, defendants were charged with a scheme to violate federal fraud statutes by inducing lenders to make improvident mortgage loans. Second, defendants were charged with a scheme to launder monetary proceeds derived from those mortgage frauds in order to promote further misconduct and to conceal the origins of the funds so earned.

On December 14, 1998, petitioner was found guilty on all charged offenses; and on May 14, 1999, he was sentenced to a term of

sixty (60) months imprisonment, to be followed by three years of supervised release. Petitioner was ordered to pay restitution in the amount of $378,278.00 and specially assessed $250.

On May 18, 1999, petitioner filed a Notice of Appeal. On July 17, 2002, the Eleventh Circuit Court of Appeals affirmed petitioner's conviction and sentence. On April 7, 2002, the Supreme Court denied a petition for writ of certiorari. Goudie v. United States, 123 S.Ct. 1763 (2003).[1]

Petitioner now moves to vacate his sentence pursuant to 28 U.S.C. §2555, claiming that his trial counsel failed to communicate a plea offer by the government prior to trial which he would have accepted had he known of its terms. Specifically, petitioner argues that the prosecution, prior to trial, extended him an offer to plead guilty to a misdemeanor charge as a lesser included offense of the charges set forth in the indictment which would have required no trial testimony and resulted in no term of incarceration (a "no time, no testimony" plea offer). Evidentiary Hearing Transcript, pg. 11. A plea to a misdemeanor charge would also have eliminated the consequences of a felony record, which petitioner now faces as a result of his conviction.

Petitioner claims that his trial counsel, Edward O'Donnell, never communicated to him the misdemeanor plea offer and instead proceeded to trial. Further, petitioner asserts that Mr. O'Donnell failed to review with him the consequences of accepting the plea offer versus his exposure to incarceration if his trial defense was unsuccessful.

Petitioner testified at the evidentiary hearing on this motion and explained that he first heard of the plea offer, but not its specific terms, after the jury returned its verdict of guilty. Petitioner recalls approaching the prosecutors, AUSA Alexander Anguiera and AUSA Thomas Mulvihill, to personally inquire whether something could be done so the he would not be remanded to following his conviction. AUSA Mulvihill told petitioner that he should have accepted the plea

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[1] Presently, the defendant is out on bond pending final resolution of his appeal and is scheduled to commence his sentence on or about August 31, 2003.

offer proposed by the government. Petitioner expressed shock and concern and stated that he had not been informed of any plea offer by his trial counsel so that he had not considered the possibility of avoiding the risk and expense of a trial.

Upon obtaining additional counsel for sentencing[2], petitioner advised Mr. Nields that a plea offer, the details of which he did not know, was apparently communicated to his trial counsel but was not relayed to him. Petitioner inquired whether this should be brought to the Court's attention at sentencing but his counsel advised that petitioner would need to present such issues after his direct appeal and in the form of a habeas petition.[3]

Petitioner also argues that his trial counsel, Mr. O'Donnell, never informed him of his exposure to incarceration or the sentencing guidelines he would face if convicted at trial. Petitioner's statement is corroborated by Mr. O'Donnell who testified that he assumed the petitioner was aware of the guidelines. Following his conviction, petitioner was advised for the first time of the applicable sentencing guidelines by appellate lawyer, David Garvin, Esq.

FACTUAL FINDINGS

A habeas corpus petitioner is entitled to an evidentiary hearing on his claims if he alleges facts which would entitle him to relief. Smith v. Singletary, Jr. 179 F. 3d 1051, 1053 (11th Cir. 1999). A district court, however, need only conduct an evidentiary hearing if it cannot be conclusively determined from the record whether a

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Goudie was represented by John Nields, Jr., Charles Graf and trial counsel Edward O'Donnell at his sentencing hearing.

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Petitioner's failure to raise and ineffective assistance of counsel claim on appeal does not preclude this Court from granting relief since the habeas petition was the appropriate means of raising this issue. "Typically, claims of ineffective assistance of counsel are inappropriate on direct appeal and should be raised, instead, in habeas corpus proceedings." U.S. v. Rivera-Sanchez, 222 F.3d 1057,1060 (9th Cir. 2000).

petitioner was not denied effective assistance of counsel. Id. at 1053. If an evidentiary hearing is held, the district court is in the best position to observe the demeanor of the witnesses and to assess their credibility. Such factual findings shall not be set aside unless clearly erroneous. United States v. Risken, 869 F.2d 1098 (8th Cir. 1989) (quoting Anderson v. City of Bessemer, 470 U.S. 564, 573-574 (1985)). Here, the trial record reveals no facts with regard to petitioner's current claim so that an evidentiary hearing was conducted by the undersigned on July 21, 2003. The Court heard testimony from petitioner's attorney, Mr. O'Donnell, from former AUSA Alexander Aguiera, from co-defendant, Julio Marrero, from petitioner's brother, Joseph Goudie, and from petitioner, John Goudie.[4]

Petitioner contends that Mr. O'Donnell, his trial counsel, provided ineffective assistance during the course of his trial proceedings by (a) failing to inform him of the misdemeanor plea offer extended by the government, and (b) failing to explain the potential consequences of not accepting the plea if convicted on the felony charges. Instead, petitioner says he was repeatedly told by his attorney that a co-defendant would testify for him at trial making his acquittal almost a foregone conclusion. However, at trial, the co-defendant did not testify and petitioner was convicted.[5]

Mr. O'Donnell, on the other hand, testified that he did inform petitioner of the government's plea offer by communicating its basic

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[4] Additionally, the Court requested and accepted a written statement from Mr. John Nields, Jr., sentencing and appellate counsel, with respect to his knowledge on related matters. Mr. Nields offers no additional information on any relevant issues.

[5] Mr. O'Donnell also testified that even when it was determined that the exculpatory witness would not testify on his client's behalf, he did not seek to determine if petitioner would accept the plea offer. Rather, Mr. O'Donnell assumed the plea was "off the table," without seeking confirmation for that assumption from the government. Evidentiary Hearing Transcript, pg. 19.

terms. Mr. O'Donnell's recollection of the matter is fairly scant. Although Mr. O'Donnell recalls telling petitioner that the government offered him a plea of "no time, no testimony" to a misdemeanor, Mr. O'Donnell indicated he did not recall if this was one or two weeks prior to trial. Evid. Hrg. Transcript, pg. 11. Further, he recalled that the conversation was very brief and occurred in the lobby of one of the federal courtrooms. Id., pg. 15. Mr. O'Donnell indicated he did not prepare notes, letters or memoranda reflecting this brief conversation. Id., pg. 15. Mr. O'Donnell did not request the prosecution to put its offer in writing-so that he never reviewed any written terms with his client. Id., pg. 14. Further, Mr. O'Donnell testified that he did not review the sentencing guidelines with petitioner of the potential consequences of going to trial versus accepting the misdemeanor plea offer. Id., pg. 16. Mr. O'Donnell testified that he assumed that petitioner was aware he was exposed to incarceration since "he had been in the case a long time before [Mr. O'Donnell] was." Id., pg. 16.

LEGAL ANALYSIS

A defendant has a Sixth Amendment right not just to counsel, but to "reasonably effective assistance of counsel." Strickland, 466 U.S. at 689. To prevail on an ineffective assistance of counsel claim, a habeas corpus petitioner must show: (1) that his attorney's performance was, under all circumstances, unreasonable under prevailing professional norms, and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result...would have been different." Id., at 687-694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694. Yet, when analyzing ineffective assistance claims, reviewing courts must indulge a strong presumption that trial counsel's conduct fell within the wide range of reasonably professional assistance. Id. at 689. In Hill v. Lockhart, 474 U.S. 52, 57-58 (1985), the Supreme Court extended the application of the Strickland test to claims of ineffective assistance of counsel arising out of the plea negotiation process. Therefore, this standard applies where a defendant foregoes a plea offer based on counsel's erroneous advice.

A. Unreasonable Performance

Based on the facts as stated above, the undersigned first finds Mr. O'Donnell's performance was unreasonable under prevailing professional norms because of his failure to adequately advise petitioner about the specific terms of the plea offer and the potential consequences of going to trial. Under Strickland, trial counsel had an obligation to consult with his client on important decisions and to keep him informed of important developments throughout the course of the prosecution. Diaz v. United States, 930 F.2d 832, 834 (11th Cir. 1991); see also, Strickland v. Washington, 466 U.S. at 688. "The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case...[and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision." Boria v. Keane, 99 F.3d 492, 496-497 (2d Cir. 1996) (quoting Anthony G. Amsterdam, Trial Manual 5 for the Defense of Criminal Cases § 201, at 339 (1988)). Therefore, a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Purdy v. United States, 208 F.3d 41, 49 (2d Cir. 2000); see also, Model Rules of Professional Conduct Rule 1.4 (b) (1995).

Analyzing this objectively reasonable standard here, the undersigned finds that Mr. O'Donnell failed to effectively assist petitioner with respect to a critical aspect of his case, namely the government's plea offer and the pros and cons of accepting or rejecting this offer. Mr. O'Donnell testified that he generally advised petitioner of the misdemeanor plea offer by communicating the offer to petitioner in a hallway or lobby of one of the federal buildings. Mr. O'Donnell never sat down with petitioner to discuss the offer in detail or to present him with the ramifications of the offer. Although Mr. O'Donnell testified that he recalls telling petitioner that he was offered a misdemeanor, "no time, no testimony" plea, it is evident from his testimony that the details and ramifications of such a plea offer were never communicated to petitioner which precluded him from truly appreciating the importance of the offer or what was actually being offered by the prosecution. Also, Mr. O'Donnell did not provide his professional guidance to petitioner as to the benefits of accepting the misdemeanor plea offer versus his criminal exposure

to felony charges at trial. Rather, Mr. O'Donnell merely told petitioner that he respected his decision to not accept the plea offer without questioning the basis or wisdom of that decision. Evid. Hrg. Transcript, pg. 11.

In so finding, the undersigned is aware that in an given case, there are countless methods by which effective assistance of counsel can be provided to a criminal defendant. Purdy, 208 F.3d at 45. Also, since defendant are more likely to second-guess their counsel's assistance after a conviction, judicial scrutiny of a defense attorney's performance must be highly deferential. Diaz v. United States, 930 F.2d at 835. For this reason, the court must indulge a "strong presumption" that defense counsel's conduct falls within the wide range of reasonable professional assistance. Slevin v. United States, 71 F.Supp.2d 348,354 (S.D.N.Y. 1999). On a claim of ineffective assistance of counsel, a petitioner must overcome a strong presumption of attorney competence. Id. However, since an accused is entitled to rely on his counsel...to offer his informed opinion as to what plea should be entered, the obstacle of overcoming a strong presumption of attorney competence can be established by focusing on counsel's behavior. Von Moltke v. Gillies, 332 U.S. 708, 721 (1948). At a minimum, counsel must communicate to his client the terms of a plea offer, and inform the client of the strengths and weaknesses of the case against him. Purdy, 208 F.3d at 45; Diaz, 930 F.2d at 834; Pater v. United States, 150 F.3d 1043, 1046 (7th Cir. 1998).

Furthermore, knowledge of the comparative sentencing exposure between standing trial and accepting a plea offer will often be crucial to the decision of whether to plead guilty. United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). Accordingly, a defense lawyer must explain to his client the maximum sentencing exposure he would face were he to elect to go to trial. United States v. Gordon, 156 F.3d 376, 380 (2d Cir. 1998). Defense counsel, employing the U.S. Sentencing Guidelines Manual, does not need to provide his client with an estimate of the probable sentencing range, but should, however, explain the maximum and minimum statutory penalties applicable to the charges faced. Slevin, 71 F.Supp.2d at 354. Because the guidelines are often complicated, it is the defense attorney's duty to explain their application to his client. Id.

While petitioner and Mr. O'Donnell disagree about whether

a plea offer was ever communicated prior to trial, Mr. O'Donnell's testimony alone is sufficient to overcome the strong presumption of attorney competence here. Slevin, 71 F.Supp.2d at 354. The brief communication recalled by Mr. O'Donnell of a "no time, no testimony" plea offer did not constitute a sufficient communication of the offer to allow for an informed decision by petitioner. Von Moltke, 332 U.S. at 721. It is undisputed that Mr. O'Donnell never sat down or took time with petitioner to discuss the advantages and disadvantages of the offer in terms of the sentence to which he was exposed on the felony charges. Thus, even assuming that the plea offer was mentioned, the information provided by Mr. O'Donnell concerning the offer was insufficient and unreasonable under the circumstances of this case.

In a similar case, Boria v. Keane, 99F.3d 492 (2d Cir. 1996), petitioner's counsel testified that he had never discussed with his client the advisability of accepting or rejecting a plea offer in a criminal prosecution. Boria, 99 F.3d at 495. The court held that counsel's failure to discuss with the defendant the advisability of accepting or rejecting the plea offer, particularly when accepting the offer was clearly in the defendant's best interests, deprived the defendant of constitutionally required advice in violation of his right to effective assistance of counsel. Id. at 496-97.

Likewise, in United States v. Day, 969 F.2d 39 (3d Cir. 1992), a habeas petitioner conceded that he had been notified about the terms of a plea offer but alleged that the advice received was so incorrect and so insufficient that it undermined his ability to make an intelligent decision about whether to accept the offer. Id. at 42. The Third Circuit held that a valid Sixth Amendment claim was presented because knowledge of the comparative sentence exposure between standing trial and accepting a plea offer was crucial in deciding whether to plead guilty. Id. at 43. Morever, familiarity with the structure and basic content of the sentencing guidelines is mandated in order for counsel to give effective representation. Id. at 44. Here, it is undisputed that Mr. O'Donnell never reviewed the sentencing guidelines with petitioner because Mr. O'Donnell assumed petitioner was familiar with those guidelines. The Sixth Amendment requires

more and failing to do so-particularly in view of a misdemeanor plea offer-was unreasonable under the circumstances.[6]

B. Prejudice

To satisfy the second Strickland factor, a petitioner must demonstrate that "counsel's unreasonable acts or omissions prejudiced him" Chu Young Yi v. Gearinger, 139 F.Supp. 2d 1393, 1410 (11th Cir. 2001). Prejudice is demonstrated when a petitioner proves a "reasonable probability that, but for counsel's unprofessional errors, the result...would have been different." Strickland, 466 U.S. at 687-694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Chu Young Yi, 139 F.Supp.2d at 1410. In the case at hand, in order to prove prejudice, petitioner is required to show that (1)he would have accepted the plea offer with the advice of competent counsel, and (2) the trial court would have accepted the plea.[7]

Analyzing this factor, the undersigned finds from the testimony presented at the evidentiary hearing that petitioner satisfies

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In so finding, this Court does not hold that counsel "must give each defendant anything approaching a detailed exegesis of the myriad arguably relevant nuances of the Guidelines" in order to comply with the Sixth Amendment. Day, 969 F.2d at 44. Nevertheless, a defendant has the right to make a reasonably informed decision whether to accept a plea offer, and therefore a defense counsel must always communicate to the defendant the terms of any plea bargain offered by the prosecution. Id.; Cullen v. United States, 194 F.3d 401, 404 (2d Cir. 1999) (defense counsel's performance was deficient insofar as he failed to inform defendant of the terms of offered plea bargain and failed to offer any advice as to whether the plea bargain should be accepted).

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It is presumed that the trial court would have accepted the petitioner's plea to a misdemeanor charge since other defendants with similar or greater involvement were allowed to accept the same or similar pleas.